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No. 09-1563

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CHAYA AND MICHAEL UNGAR, YITTY NIEMAN, FRIEDRICH AND REGINA WEISER, MOSHE DEUTSCH, ISAAC TELLER, SOLOMON WOLLNER, SHIA PINCHUS SCHWARTZ, IRENE ACKERMAN, YEHUDA STEIN, SOLOMON WERZBERGER, JOSHUA ADLER, CHAIM EIDLISZ, AZRIEL KATZ, MOISHE STERN, ESTHER SCHWARTZ, on their own behalf and on behalf of all others similarly-situated,

Petitioners,

v.

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

STEVEN J. RAPPAPORT
Counsel of Record
SONYA M. KALOYANIDES
GENERAL COUNSEL
NEW YORK CITY HOUSING AUTHORITY
Attorney for Respondent
250 Broadway, 9th Floor
New York, New York 10007
(212) 776-5152
steven.rappaport@nycha.nyc.gov

Attorneys for Respondent

QUESTION PRESENTED

Does the Second Circuit's opinion that plaintiffs could not establish a Free Exercise Clause violation because Respondent New York City Housing Authority's (NYCHAs') Tenant Selection and Assignment Plan is neutral, generally applicable, and has a rational basis conflict with prior decisions of this Court in an important way?

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STATEMENT OF THE CASE

As the courts below recognized, this case can best be understood against the backdrop of prior litigation over the tenanting of the developments in question. That litigation includes:

The Williamsburg Case

In 1976, the Williamsburg Fair Housing Committee filed a class action suit against NYCHA and others, alleging among other things that NYCHA had discriminated against non-white (black and Hispanic) families in renting apartments in the three NYCHA developments in Williamsburg, Brooklyn — Independence Towers, Taylor-Wythe Houses and Jonathan Williams Plaza ("the three Williamsburg developments") The United Jewish Organizations of Williamsburg, Inc. ("UJO"), representing white families applying for Williamsburg housing, intervened in the suit as a defendant and a third-party plaintiff. In 1978, the suit was settled by the entry of a consent decree ("*Williamsburg* consent decree") (JA 638, 691-729).[1]

Among its permanent injunctive provisions, the *Williamsburg* consent decree expressly prohibited NYCHA from any preferential treatment based on religion at the three Williamsburg developments (JA 638, 699). In their complaint, Plaintiffs herein explicitly seek preferential treatment at the three Williamsburg developments based on their religion

1. Numerical references preceded by "JA" are to pages of the Joint Appendix.

(JA 51). The *Williamsburg* consent decree was approved by Judge Charles H. Tenney in May 1978 (JA 719). When Judge Tenney died in 1994, the *Williamsburg* consent decree was transferred to Judge Robert W. Sweet.

Judge Sweet presided over lengthy and bitter litigation under the *Williamsburg* consent decree, beginning in 1995 and ending only at the end of 2005. That litigation focused on plaintiffs' allegations that NYCHA discriminated in favor of Hasidic Jewish families in the three Williamsburg developments. The litigation ended in a settlement agreement that terminated the consent decree. *See Williamsburg Fair Housing Committee v. NYCHA*, 2005 U.S. Dist. LEXIS 5200 at 2-7 [S.D.N.Y. Mar. 31, 2005 (RWS)].

Representatives of the Hasidic Jewish community in Williamsburg participated in the discussions leading to the settlement agreement, and the United Jewish Organizations of Williamsburg, Inc. signed the settlement as a party. Indeed, Azriel Katz, one of the plaintiffs herein, attended a final settlement negotiation meeting on February 5, 2002, at the Southern District of New York Courthouse (JA 639).

The Davis Decree

In January 1990, The Legal Aid Society filed a class-action suit against NYCHA, alleging that NYCHA had discriminated against Black and Hispanic applicants for public housing in its tenant selection and assignment policies, with the result that more than 30 of its developments were disproportionately white. The United States Department of Justice filed a parallel

action against NYCHA, and the two cases were consolidated as *Davis v. NYCHA*, 90 Civ. 628, 92 Civ. 4873 (S.D.N.Y. 1992 [PNL]). In 1992, both cases were settled by the entry of a consent decree ("*Davis* consent decree"). The decree "permanently enjoined" NYCHA from discriminating on the bases of race, color, or national origin (JA 649). Although the rest of the decree was to be dissolved eight years and six months after entry, the permanent injunctive provisions were expressly excepted from dissolution (JA 682); *Davis v. NYCHA*, 278 F3d 64, 67 (2d Cir. 2002)*cert denied*, 536 U.S. 904, 153 L. Ed. 2d 179, 122 S. Ct. 2357 (2002). The *Davis* consent decree was approved by Judge Pierre N. Leval in December 1992. *See Davis v. NYCHA*, 1992 U.S. Dist. LEXIS 19965 (S.D.N.Y. Dec. 30, 1992 [PNL]). When Judge Leval was elevated to the Second Circuit in 1993, the *Davis* consent decree was transferred to Judge Sweet (JA 638).

The *Davis* plaintiffs objected to NYCHA's previous admissions policies primarily on the grounds that they led to the concentration of racial and ethnic groups into certain developments. Therefore, as part of the decree's injunctive relief, NYCHA agreed to implement a new Tenant Selection and Assignment Plan ("TSAP") to avoid the concentration of racial and ethnic groups into certain developments. (JA638, 643-44, 649-55). A copy of the current TSAP was produced in the Joint Appendix in the Court of Appeals (JA64-102).

The TSAP

Applicants

Applicants for public housing initially select a first and second borough in which they wish to live but may not request that their application be assigned to a particular development or "project". Each application is dated, time-stamped, and assigned a priority code (JA 65). A computer then selects applicants to be interviewed based on borough of first choice, apartment size required, priority, and date of application (JA 74). Applicants who are interviewed and found eligible then choose either a development or a borough, depending on the type of apartment they need (JA 75-81).

To promote efficient tenanting and to avoid racial and ethnic concentration, the TSAP limits most applicants to a choice among developments that actually anticipate vacancies within six to nine months, regardless of the applicants' desires to live in a particular neighborhood or a particular development. Emergency applicants and applicants for scarce "larger apartments" (defined as five bedrooms or more) may not select a particular development; instead, they select their preferred borough, and are placed on a borough-wide list and offered the first appropriate vacancy within their preferred borough, in order to place them more quickly and efficiently. Applicants make either their development choice or their borough choice only after they have been interviewed and found eligible for public housing. Significantly, and contrary to plaintiffs' allegations, no applicants in any category are permitted to designate developments that do not anticipate vacancies or to designate geographical areas smaller than a borough (JA 65-66, 75-81).

Transfers Due to Crowded Conditions

NYCHA's Tenant Selection and Assignment Plan (JA64-102) provides that tenants who are approved for transfer because their current apartments are "overcrowded" or "extremely overcrowded" according to approved occupancy guidelines "must choose their current project, unless the project contains no apartments of the size required." Those who need apartments of five bedrooms or more, and whose projects contain no apartments of the size required, may choose only the borough in which they wish to live; those who need apartments of four bedrooms or less, and whose projects have no apartments of the size required, may choose any project designated as anticipating vacancies on the Guide to Anticipated Vacancies (JA 87-88, 90).

Other Transfers

NYCHA tenants are permitted to transfer to different apartments for a large variety of reasons (JA 82-91). Because of the nature of some of the reasons, transferees in certain categories are not required to select a development anticipated to have vacancies in the next six to nine months. For example, tenants who must move within six months due to project renovation (JA85) and tenants living in under-occupied apartments (e.g., one person living in a two-bedroom apartment) (JA86) may select any development. Transferees who show that medical care is available only at a specific facility not within 60 minutes travel time from their home or that a relative can provide home health or travel care not available within 60 minutes of travel time from their home are automatically assigned to a development near the facility or relative (JA88-89).

Option to Change Waiting Lists

When a tenant has been on a waiting list for a particular development for more than two years without having been offered an apartment, the tenant may, but is not required to, choose another development (JA 92). In the absence of an emergency, tenants (or applicants) who have chosen a particular development will have their application deemed "dead" if they reject any apartment offer in that development whereas tenants on a borough waiting list may refuse one offer and remain on the list (JA 92-93).

Special Outreach

When particular developments or types of apartments are difficult to rent, NYCHA may send letters to applicants on a preliminary waiting list, or on a development waiting list, advising them of the possibility that they could be reached sooner if they are willing to accept an apartment at that development or of that type. Those applicants who respond positively are processed for that apartment. Those who do not respond positively do not have their position on the preliminary waiting list or the project waiting list affected (JA 97-100, 423-426).

Hasidic Objection to TSAP

Before the *Davis* consent decree was approved, the Hasidic community of Williamsburg submitted a comment opposing features of the TSAP that would limit the ability of Hasidic families to choose the three Williamsburg developments (JA 638, 688-90). In his

decision approving the *Davis* consent decree, Judge Leval explicitly considered and rejected the objections of the Williamsburg Hasidic community (JA 638). *See Davis v. NYCHA*, 1992 U.S. Dist. LEXIS 19965 at 14 (S.D.N.Y. Dec. 30, 1992 [PNL]). Plaintiffs herein once again object to these features of the TSAP, precisely on the grounds that they do not allow Hasidic Jewish families to concentrate themselves in the three Williamsburg developments (JA 23-26, 638).

Subsequent Davis Litigation

In 1996, NYCHA sought to amend the TSAP to add a "working family preference," and to change its definition of "smaller apartments" from two bedrooms or fewer, to four bedrooms or fewer. The Legal Aid Society objected to both amendments. In 1997, Judge Sweet approved the second amendment (JA 638). *See Davis v. NYCHA*, 1997 U.S. Dist. LEXIS 10451 (S.D.N.Y. July 17, 1997).

Judge Sweet also approved the working family preference, but with one exception. He ruled that any NYCHA development that was more than 30 percent white was deemed "segregated." The three Williamsburg developments are all more than 30 percent white. Judge Sweet further ruled that NYCHA could make no change to the TSAP that would "perpetuate segregation" by slowing the decrease in the number of white families at any of the "segregated" developments. Finally, he found that the working family preference would "perpetuate segregation" at the three Williamsburg developments, even though it was agreed by all parties that the difference between the two

versions of the TSAP would only amount to perhaps 0.5 white families per year at each of the three Williamsburg developments. *See Davis v. NYCHA*, 1997 U.S. Dist. LEXIS 10451 (S.D.N.Y. July 17, 1997); 1997 U.S. Dist. LEXIS 18111 (S.D.N.Y. Nov. 13, 1997); 60 F. Supp. 2d 220 (S.D.N.Y. 1999); 103 F. Supp. 2d 228 (S.D.N.Y. 2000); *affirmed in part and reversed in part*, 278 F.3d 64 (2d Cir. 2002); *cert. denied*, 536 U.S. 904 (2002).

Characteristics of Residents at Williamsburg Developments

Jewish families constitute approximately half the families at the three Williamsburg developments, and they are by far the largest racial/ethnic group there (JA 425-94).

In response to this information, plaintiffs submitted an affirmation from one Solomon Lieser, who described himself as a resident of Williamsburg and offered his impression that "very few" Hasidic families have been "given housing" in any Williamsburg development since 1993 and that "during the last ten years, no new Hasidic family has received any housing" (JA 431-34). However, turnover logs show that 24 Jewish families had rented apartments at the three Williamsburg developments between 1998 and 2006 (JA 510-631, 759).

2008 data shows that white, Jewish families still predominate in the three developments. In particular, Mr. Lieser is, unfortunately, incorrect that the percentage of white families in any of the three developments is below 30%, the figure Judge Sweet deemed to be indicative of segregation. In fact, those

figures range from a low of 42.7% in Mr. Lieser's development, Independence Towers, to a high of 52% at Williams Plaza (JA 759, 767-69).

The Plaintiffs

Plaintiffs consist of two groups: applicants for public housing who seek to obtain housing in one of the three Williamsburg developments and current tenants in one of the three developments who need to transfer to another apartment, for reasons unrelated to religion, but want to remain in Williamsburg due to their religious requirements. Most have never been affected by the policies they challenge because they were never certified as eligible for public housing.

Applicants

The first group of plaintiffs — alleged applicants for public housing — consists of six families: Nieman, Deutsch, Wollner, Ackerman, Stein, and Stern. None of them have shown they were affected by the TSAP as alleged. At least four of the six — Deutsch, Wollner, Ackerman, and Stein — had no eligibility interview on their last application. The limited-choice features of the TSAP do not even come into play until after an applicant has been called in for an eligibility interview and has been found eligible for public housing (JA 74-79).

Tenants Seeking Transfers

The second group of plaintiffs — tenants of the three Williamsburg developments seeking transfers to larger apartments — consists of nine families: Chaya and

Michael Ungar (a/k/a Mechl Unger), Friedrich and Regina Weiser, Isaac Teller, Shia Pinchus Schwartz, Solomon Werzberger, Joshua Adler, Chaim Eidlisz, Azriel Katz, and Esther Schwartz. Although all initially alleged they needed "large apartments" of five bedrooms or more that would be subject to the special rule about such apartments, seven were shown not to need such large apartments (JA 440).

Plaintiffs Deutsch, Wollner, Stein, Stern, and Eidlisz all claim to have been "offered" apartments outside of Williamsburg (JA 24-27, 32). However, none of them say that they selected an apartment from the Guide to Anticipated Vacancies. Rather, it appears that the "offers" they refer to were canvases of their interest in hard to tenant apartments as part of a special outreach. Their expression of disinterest in such apartments would have no effect on their position on their respective waiting lists (JA 97-100, 423-426).

Large Apartments in Williamsburg

Plaintiffs seek to be able to remain on the waiting list for large apartments in all three of the Williamsburg developments rather than just their own. However, the waiting times for "large apartments" in Williamsburg are not appreciably different at the three Williamsburg developments (JA 444, 507-09). More broadly, the "large apartments" plaintiffs covet are occupied almost entirely by other Jewish families. Specifically, of 56 such apartments, 53 are occupied by Jewish families (JA 445-46, 452-94, 510-631). Moreover, in the 16 years since the TSAP was implemented, there have been only two vacancies in the 56 "large apartments" in the three

Williamsburg developments. Of the two vacancies which occurred, both went to Hasidic Jewish families living in the developments (JA 448).

In their motion for summary judgment, plaintiffs ignored the ability of tenants to remain on the waiting list for an apartment in their own developments and emphasized in bold face type that "**Large families [in need of seven rooms or more or five or more bedrooms] are not given the chance to specify developments of choice, merely boroughs.**" (JA 17).

Confronted with the facts about large apartments, plaintiffs submitted a Reply Affirmation of concerned neighborhood resident Solomon Lieser accusing NYCHA of mischaracterizing plaintiffs' claim as concerning NYCHA's policy concerning transfers of large families. Those tenants who "merely sought to transfer to a slightly larger apartment" are discriminated against, he now asserted (JA 756). Mr. Lieser did not acknowledge that, like any other tenants with project choice, tenants in overcrowded apartments seeking apartments of less than seven rooms may stay on the waiting list at their own developments until an apartment becomes available or, after two years, may select any development with anticipated vacancies, including the other Williamsburg developments (JA 92).

Procedural History

Plaintiffs filed their complaint in the Eastern District of New York on or about June 15, 2005, alleging that NYCHA policies regarding the admission and transfer of public housing tenants do not adequately

accommodate their religious need to live at one of three NYCHA developments in Williamsburg. Although plaintiffs brought this case as a purported class action, they never moved for class certification. NYCHA moved to transfer venue to the Southern District of New York; the motion was granted by the Honorable Raymond J. Dearie on March 6, 2006 and the case transferred to Judge Sweet.

After a substantial discovery period, plaintiffs and defendant each moved for summary judgment and the motions were fully submitted June 18, 2008.

In their summary judgment motion, plaintiffs argued that NYCHA is required, under the Religious Freedom Restoration Act, 42 U.S.C. 2000b-1 et seq. ("RFRA"), to exempt them from NYCHA tenanting procedures. In its response, NYCHA pointed out that RFRA does not apply to state and local governments, having been amended after the Supreme Court had held application to the states to be unconstitutional, and could not, therefore, apply to NYCHA, a municipal entity created under the laws of New York State.

In response to defendant's motion for summary judgment, plaintiffs argued that NYCHA has violated the Free Exercise Clause of the First Amendment of the United States Constitution as applied to NYCHA by the Fourteenth Amendment; the Equal Protection Clause of the Fourteenth Amendment; and the Fair Housing Act, 42 U.S.C. § 3601 *et. seq.*

The Decision of the District Court

In a decision filed January 14, 2009, the District Court denied plaintiffs' motion and granted defendant's motion (13a-46a).[2] The Court summarized previous litigation regarding the three Williamsburg developments; NYCHA's tenant selection process; plaintiffs' objections to the process; and the facts as to each plaintiff (15a-32a). The Court then denied plaintiffs' motion for summary judgment on the ground that the RFRA did not apply to NYCHA (32a-37a).

The Court next held that defendant had not established a statute of limitations defense because the record was not clear as to when certain alleged actions occurred (SA 85-87).

The Court granted defendant's motion with respect to plaintiffs' Fair Housing Act claim because plaintiffs had not adduced evidence sufficient to demonstrate a discriminatory effect nor shown any connection between NYCHA's facially neutral policies and any such effect (SA 87-95). The Court then granted defendant summary judgment as to plaintiffs' First Amendment claim because the policies in issue "do not bar any particular religious practice or interfere in any way with the free exercise of religion by singling out a particular religion or imposing any disabilities on the basis of religion" (SA 95-97).

2. Numerical references preceding "a" are to the appendix to the Petition for a Writ of Certiorari.

Entry of Judgment for Defendant

Plaintiffs filed a notice of appeal on February 10, 2009. Because both parties believed that the Court's January 14 decision effectively resolved all issues in favor of defendant, plaintiffs requested the Court to enter judgment for defendant *nunc pro tunc* to January 14. Judge Sweet so ordered that request on February 25, 2009. Judgment for defendant was entered on April 30, 2009.

The Decision of the Court of Appeals

On January 26, 2010, the Court of Appeals affirmed the judgment (1a-5a). Summary judgment for defendant was appropriate, the Court found, "because plaintiffs have not established a prima facie case that TSAP has a disparate impact on Orthodox Jewish families" (3a). In particular, "there was no evidence that Orthodox Jewish applicants are under-represented even among new Williamsburg tenants" (4a). Finally, the Court held, "Because TSAP is neutral, generally applicable, and has a rational basis, plaintiffs failed to establish a Free Exercise violation" (5a). Plaintiffs then moved for panel rehearing or rehearing *en banc* and the application was denied on March 26, 2010.

REASON FOR DENYING THE PETITION

THE DECISION OF THE COURT OF APPEALS DECISION IS IN ACCORD WITH OPINIONS OF THIS COURT.

Plaintiffs assert that the TSAP generally precludes an eligible applicant from choosing a particular development but creates exceptions for secular reasons. This conflicts with prior decisions of this Court, they continue, in the absence of a compelling purpose for refusing to create such an exception for religious reasons. In making this argument, plaintiffs badly mischaracterize both the facts and the law.

Applicants

All eligible applicants for public housing must, depending on their priority code, either select a development from a Guide listing those expected to have vacancies in the next six to nine months or select a borough (JA65-81). Conversely, no applicants are permitted to select a development not expected to have vacancies in the next six to nine months and no applicants may select a geographic unit smaller than a borough (*id.*). Thus, to the extent the applicant plaintiffs are arguing that they are not being given the benefit of an exception permitted for secular reasons, they are simply factually incorrect.

Transferors

Tenants who need to transfer for certain reasons are permitted to select particular developments or areas in order to effectuate the reason for the transfer. Thus, tenants who are transferring because they need to be

near a particular medical facility are assigned to a development near that facility (JA88). Similarly, tenants who need home health care or child care from a family member who is more than 60 minutes travel time from the family member are assigned to a development near the family member (JA88-89). To do otherwise would not effectuate the purpose of the transfer. As the Court of Appeals recognized, these "exceptions" are equally available to Hasidic Jews as to any other tenant.

All of the plaintiffs who are NYCHA tenants are living in the Williamsburg community they desire to live in. None are seeking to transfer for a religious purpose. Accordingly, to the extent they intend to argue that NYCHA must permit transfers for religious purposes, such argument is inapposite to their situation. Rather, the only reasons for which plaintiffs have sought transfers have been overcrowded conditions and, in one instance, a need to be on a lower floor for medical reasons.

Any tenant who is approved for a transfer because of overcrowded conditions or because of a need to be on a lower floor for medical reasons may stay on the waiting list at the tenant's own development for as long as the tenant wants if there are any apartments meeting the tenant's needs in that development (JA 87-90). Since all of the tenants seeking transfers live in one of the Williamsburg developments, they can not claim that NYCHA policies are depriving them of public housing in Williamsburg. Although these tenants would presumably have a better chance of finding a suitable apartment more quickly if they could designate three

developments rather than one, they are in that respect no different than any other tenant seeking a transfer for similar reasons.

NYCHA has shown that all the families on the waiting lists for apartments of seven rooms or more in the three Williamsburg developments are Hasidic Jewish families currently living in those developments and that those apartments are currently occupied almost entirely by Jewish families (JA 444-447, 453-94, 507-631). Under the circumstances, plaintiffs requiring seven rooms or more can hardly claim to be denied the free exercise of their religion by their inability to list all these developments rather than go on a borough list after two years.

Thus, plaintiffs do not really seek to be allowed to avail themselves of some "exception" granted for secular reasons. Rather, they seek an advantage over those who do not belong to their sect in obtaining the very desirable apartments in Williamsburg. The law does not require that they be granted such an advantage. *Cf., Hack v. President & Fellows of Yale College*, 237 F.3d 81, 88 (2nd Cir. 2000), *cert denied* 534 U.S. 888 (2001), (affirming lower court decision, reported at 16 F. Supp.2d 183, 193 (D. Conn. 1998), ("[T]he FHA does not require a landlord or seller to provide a reasonable accommodation with respect to an individual applicant's religion.")

The Court of Appeals Applied the Correct Standard.

In *Employment Div., Dept of Human Resources of Ore. v. Smith*, 494 U.S. 872, 890 (1990), this Court held that "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest". The Court reiterated that principle in *Church of the Lukumi Babalu AYE, Inc.* 508 U.S. 520, 532 (1993).

In 1993, Congress attempted to nullify the *Smith* decision by passing the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb 1, ("RFRA"). In *City of Boerne v. Flores*, 521 U.S. 507 (1997), this Court struck down the RFRA as unconstitutional as applied to states and their subdivisions. In 2000, Congress responded to the *Flores* decision by amending RFRA to remove all references to States and their subdivisions. Nevertheless, plaintiffs moved for summary judgment below, citing RFRA. On appeal, plaintiffs conceded that "RFRA does not apply to the state or municipalities" (Appellants' Brief, pp. 33 34) but then immediately ignored that concession by seeking to apply what they aptly characterize as "pre-Smith Free Exercise cases" (Appellants' Brief, p. 34). They simply refused to acknowledge that *Smith* lays out the appropriate standard for analyzing claims against states and municipal entities under the Free Exercise Clause.

In the instant petition, plaintiffs take their refusal to accept the *Smith* standard one step further by seeking to apply the contrary doctrine of *Sherbert v.*

Vernicr, 374 U.S. 398 (1963), decided 27 years previously. In *Sherbert*, the Court held that an unemployment compensation applicant who refused to work on Saturday for religious reasons could not be denied benefits on the ground that she had not shown "good cause" for refusing work. *Sherbert* and the very similar subsequent cases of *Thomas v. Review Bd. Of Indiana Employment Security Div.*, 450 U.S. 707 (1981), and *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987), applied a strict scrutiny test to these types of determinations.

Plaintiffs now argue that *Sherbert*, not *Smith*, applies in cases involving government benefits. One unacknowledged problem with this argument is that *Smith* involved the very government benefit — unemployment compensation — that *Sherbert*, *Thomas*, and *Hobbie* involved. Rather, the *Smith* Court expressly limited *Sherbert* to unemployment compensation cases in which "the eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment." 494 U.S. at 884. In other words, the State was precluded from determining that Sherbert's religious belief did not constitute the "good cause" required by the State statute in the absence of a compelling interest. As the Court of Appeals recognized, the NYCHA TSAP challenged herein does not permit such *ad hoc* determinations of "good cause" for seeking to live in particular neighborhoods. Only predefined categories of transferors are permitted to designate neighborhoods, rather than developments or boroughs, to which they wish to transfer.

That *Sherbert* does not govern all government benefits cases is further shown by this Court's handling of *Bowen v. Roy*, 476 U.S. 693 (1986). The majority of the Court in *Roy* held that, regardless of whether it was necessary to effectuate a compelling interest, a federal statutory scheme that required benefit applicants and recipients to provide their Social Security numbers could be applied to plaintiffs who asserted it would violate their religious beliefs to obtain a Social Security number for their daughter. 476 U.S. at 699-701; *see also Smith*, 494 U.S. at 883. Indeed, far from showing that cases involving government benefits require a stricter level of scrutiny than other types of asserted violations of the Free Exercise Clause, the plurality opinion in *Roy* indicates exactly the opposite:

"Appellees may not use the Free Exercise Clause to demand Government benefits, but only on their own terms, particularly where that insistence works a demonstrable disadvantage to the Government in the administration of the programs." 476 U.S. at 711-12. ". . . denial of such benefits by a uniformly applicable statute neutral on its face is of a wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of penal sanctions, for conduct that has religious implications." 476 U.S. at 701.

Plaintiffs Cannot Show NYCHA Has Any Discriminatory Object.

Since the Supreme Court's *Smith* decision, it has been established "that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has

the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. 520, 531; *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2d Cir. 2002). "Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531. The New York Court of Appeals has recognized that "a generally applicable and otherwise valid enactment, which is not intended to regulate religious conduct or beliefs but which may incidentally burden the free exercise of religion, is not deemed to violate the First Amendment." *Matter of New York State Empl. Relations Bd. V. Christ the King Regional High School*, 90 N.Y.2d 244, 248 (1997).

Neutrality is found lacking only "if the *object of a law*" is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533 (emphasis added) (finding that suppression of a religious practice of animal sacrifice "was the object of the ordinances" because the only conduct subject to the ordinance was this religion's sacrifice practice). Plaintiffs herein have not adduced a shred of evidence that the object of the NYCHA procedures they challenge was to restrict their religious practices. Under the circumstances, they can not establish discrimination under the Free Exercise Clause and are not entitled to any change in, or exemption from, NYCHA procedures to accommodate their religious needs.[3]

3. Plaintiffs' inability to show a discriminatory purpose also dooms their claim under the Equal Protection Clause of the Fourteenth Amendment. *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979).

Plaintiffs' Free Exercise of Religion Has Not Been Burdened.

Putting aside the lack of discriminatory intent of the NYCHA policies in question, they simply do not burden plaintiffs' free exercise of religion in any way. NYCHA is not requiring plaintiffs to engage in any act that is contrary to their religion. "The Free Exercise Clause is written in terms of what the government cannot do to the individual not in terms of what the individual can extract from the government." *Bowen v. Roy*, 476 U.S. 693, 700 (1986)(plurality opiion, quoting Douglas, J. concurring in *Sherbert*). NYCHA is doing nothing to plaintiffs other than providing subsidized housing to many of them. They have every right to reject public housing outside of Williamsburg but their exercise of that right does not obligate NYCHA to bend its rules to give them a better chance than others to obtain public housing in Williamsburg.

Further, even if plaintiffs could establish that their exercise of religion is substantially burdened by NYCHA policies, that is insufficient to establish a disparate impact. As the Supreme Court explained in *Flores*, 521 U.S. 507, 535:

> It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs.

NYCHA Has Compelling Reasons for Not Accommodating Plaintiffs.

Putting aside the lack of any discriminatory intent and the lack of any burden on plaintiffs' religion, the NYCHA policies in question are justified by compelling purposes. Plaintiffs argue that the TSAP was designed, in part, to reduce the numbers of Hasidic Jews in Williamsburg. They fail to apprehend that it is the very lack of consciousness of race and religion in TSAP that is designed to reduce, over time, the disproportionately large number of white tenants, including Hasidic Jews, in the Williamsburg developments. In the *Davis* litigation, Judge Sweet held these developments to be segregated and forbade NYCHA from taking steps to slow down the rate of desegregation. While plaintiffs might not be bound by Court orders in prior litigation, NYCHA is so bound. The policies sought by plaintiffs would, by their design and intent, increase the numbers of Hasidic Jews, and therefore, the numbers of whites, in these developments. The rate of desegregation would slow down and probably be reversed, violating the permanent injunction in the *Davis* decree and reigniting the passions of the 30 year conflict resolved in the *Williamsburg* case. Those policies would be discriminatory; the non-race-conscious TSAP is not.

Allowing Hasidic Jewish applicants to designate the three Williamsburg developments as the developments in which they wish to reside, regardless of anticipated vacancies in those developments and maintaining those applicants on the waiting lists for those developments until they are offered an apartment there, as plaintiffs want, would create what are called "site-based waiting

lists" for the three Williamsburg developments. *See* 42 U.S.C. § 1437d(r), and 24 C.F.R. § 903.7(b)(2). But under plaintiffs' proposal, these site-based waiting lists would be open only to Hasidic Jewish applicants.

This proposal would have the following results: Presumably many Hasidic Jewish families would apply for the three Williamsburg developments. Since NYCHA would then have no need for other applicants to fill the vacancies in those developments, those developments would never appear on the Guide to Anticipated Vacancies (JA 71-73). Therefore, virtually all the families on the waiting lists for these three developments would be Hasidic Jewish families, and in the course of time, the developments would be populated almost entirely by Hasidic Jewish families.

This result would violate 42 U.S.C. § 1437d(r)(1), which requires site-based waiting lists to "comply with all provisions of Title VI of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d et seq.), the Fair Housing Act (42 U.S.C. §§ 3601 et seq.), and other applicable civil rights laws." It would also appear to violate several provisions of 24 C.F.R. § 903.7(b)(2), such as subsection (iv), which requires "reasonable marketing activities to attract applicants regardless of race or ethnicity."

The first sentence of the TSAP articulates its goals: "The New York City Housing Authority has adopted this Tenant Selection & Assignment Plan . . . to assure that it receives and processes applications for conventional public housing *efficiently and in accordance with the laws*" (JA 65) (emphasis added).

The two goals of efficiency and compliance with the law are NYCHA's reasons for avoiding the kind of site-based waiting lists proposed by plaintiffs.

Site-based waiting lists would produce serious inefficiencies in NYCHA's rental process. Applications would pile up in "desirable" developments, while "less-desirable" developments would never have enough applications to fill vacancies. NYCHA would thus have the administrative burden of maintaining useless applications for years and years on the waiting lists of "desirable" developments, while suffering dangerous vacancy loss in the "less-desirable" developments (JA 443).

Site-based waiting lists would also encourage racial and ethnic segregation in NYCHA's developments. For example, NYCHA's developments in Chinatown, so attractive to the Asian community, would become Asian enclaves. And the three Williamsburg developments would become white Jewish enclaves, as explained above (JA 444).

Accommodating Plaintiffs Would Violate the Establishment Clause.

The Establishment Clause of the First Amendment prohibits governments from passing laws which have the "purpose or effect of advancing or inhibiting religion." *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-9 (2002). In determining whether government action has the purpose or effect of advancing religion, courts ask whether the government action gives special

treatment to a religious group. *Bd. Of Educ. Of Kiryas Joel v. Grumet*, 512 U.S. 687, 706-707 (1994) (striking down law creating separate school district for Hasidim because the "proposed accommodation singles out a particular religious sect for special treatment, and . . . it is clear that neutrality as among religions must be honored"). Moreover, a policy may not provide benefits to religious groups that are not available to nonreligious groups. *Texas Monthly v. Bullock*, 489 U.S. 1, 11 (1989) (stating that in cases where religious accommodation was deemed constitutional

> we emphasized that the benefits derived by religious organizations flowed to a large number of nonreligious groups as well. Indeed, were those benefits confined to religious organizations, they could not have appeared other than as state sponsorship of religion; if that were so, we would not have hesitated to strike them down for lacking a secular purpose and effect).

Courts also determine whether a symbolic link between the government and the religion has been created by the religious accommodation. *Parents' Assoc. of P.S. 16 v. Quinones*, 803 F.2d 1235, 1241 (2d Cir. 1986)(finding that a city plan to educate Hasidic girls separately in a public school to accommodate Hasidims' desire to avoid mixing with non-Jews had the primary effect of advancing religion since the separate treatment of Hasidim created "a symbolic link between the state and the Hasidic sect"); *Bollenbach v. Board of Education*, 659 F. Supp. 1450, 1464 (S.D.N.Y. 1987) (finding that district plan to accommodate Hasidims' religious sensitivities by allowing only male bus drivers to

bus male Hasidic children would have the primary effect of advancing Hasidims' religion by "promoting the Hasidic tenet that boys must not be in contact with women" and thereby creating "a symbolic endorsement by the Court and the District of [the Hasidims'] religious beliefs").

Exempting Hasidim from NYCHA procedures would favor them over other religious groups and non-religious groups and would create a symbolic link between NYCHA and Hasidism. Consequently, it is not permitted under the Establishment Clause.

This Court has recognized that avoiding an Establishment Clause violation "may be characterized as compelling." *Widmar v. Vincent*, 454 U.S. 263, 271 (1981).

Thirty eight years ago, in the case most similar to the instant one, former Judge Frankel chastised NYCHA for giving a preference to Jews in certain dwellings because the dwellings were convenient to an old and historic synagogue:

> However laudable their motives, the officials of the City Housing Authority have allowed themselves to employ a criterion of religious selection which the Constitution commands them to eschew. . . The duty of the City Housing Authority is to consider applicants without regard to race, creed, color, or national origin. That duty is violated — and the command of the First Amendment is specifically transgressed — when administrators prefer one applicant over another because of religious faith and convenience of worship.

Otero v. NYCHA, 344 F. Supp. 737 (S.D.N.Y. 1972).

Plaintiffs herein seek to revive the same arguments rejected by this and other Courts for at least 38 years. If, as plaintiffs suggest may occur, other religious groups seek similar treatment, NYCHA developments will become more and more segregated. On the other hand, if no other groups seek similar treatment, a symbolic link between NYCHA and Hasidism is inevitable. There is no way around the fact that exempting Hasidim from NYCHA procedures would favor them over other religious groups and non-religious groups and would create a symbolic link between NYCHA and Hasidism. Consequently, it is not permitted under the Establishment Clause.

CONCLUSION

The Petition for a Writ of Certiorari Should Be Denied.

Respectfully submitted,

STEVEN J. RAPPAPORT
Counsel of Record
SONYA M. KALOYANIDES
GENERAL COUNSEL
NEW YORK CITY HOUSING AUTHORITY
Attorney for Respondent
250 Broadway, 9th Floor
New York, New York 10007
(212) 776-5152
steven.rappaport@nycha.nyc.gov

Attorneys for Respondent